IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**CR-03-BE-0530-S**
	)	
RICHARD M. SCRUSHY,	)	
	)	
Defendant.	)	

MOTION BY BLOOMBERG NEWS, THE ASSOCIATED PRESS, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE HEARST CORPORATION, AND THE BIRMINGHAM NEWS COMPANY FOR LEAVE TO INTERVENE

Bloomberg News, a division of Bloomberg L.P., The Associated Press, The Reporters Committee for Freedom of the Press, The Hearst Corporation, and The Birmingham News Company (jointly "Media Intervenors") move this Court for an Order granting leave to intervene in this matter for the limited purpose of seeking an order: (1) requiring that all previous docket entries pertaining to sealed filings in this case be amended to disclose information regarding the substance, type, and/or kind of information that is sealed; and (2) mandating that no additional filing be made under seal unless it has first been preceded by a motion, publicly docketed, and with sufficient notice to the public, describing the substance, type, and/or kind of information sought to be sealed.

INTRODUCTION

History will label the past decade as the greatest test of our nation's ability to monitor, to regulate – and when needed – to punish the myriad abusers of our financial markets.

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[redacted]

In a few short years, tens of thousands of investors, workers, pensioners, union members, and other citizens lost billions of dollars in corporate greed scandals that also have eroded the trust of the American public in our financial markets.[1] Media Intervenors urge this Court not to allow the lack of trust generated by these scandals also to taint the criminal justice system responsible for righting these wrongs.

After the fraud-induced collapse of Enron, WorldCom, Tyco, and others, Congress passed The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002 (commonly referred to as "Sarbanes-Oxley"). In the legislative hearing leading up to the law's passage, Representative Michael Oxley, Chairman of the House Committee on Financial Services, told the American public:

> Our hearings have revealed that while some bad actors may seek to take advantage of investors, ultimately the laws and the marketplace will catch up with them. No one should doubt that America remains the best place to invest, not only for the ability of our workers and the ingenuity of our entrepreneurs, but also because America does not tolerate cheats.

Corporate and Auditing Accountability, Responsibility and Hearing on H.R. 3763 Before the House Comm. on Financial Services, 107th Cong. (2002) (statement of Michael G. Oxley, Member, Chairman, House Comm. on Financial Services).

The responsibility of the Court in this case is truly weighty, for it is the first criminal prosecution under Sarbanes-Oxley. It will test the constitutionality of a law that seeks to protect millions of American investors. In turn, it will determine the rules by which thousands of American executives must run their publicly traded companies.

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[1] The loss to the American public has been staggering. Enron claimed 2000 revenues of more than $100 billion: one year later it filed for bankruptcy. WorldCom filed for bankruptcy in 2002 after admitting more than $11 billion in accounting irregularities, and is currently negotiating more than $500 million in taxes owed to at least 14 states. Former Tyco International Ltd Chief Executive Officer Dennis Koslowski faces enterprise corruption charges in a retrial after arrest for taking more than $170 million in unauthorized bribes and loans. *See generally, "WorldCom, Tyco, Enron--R.I.P." by Dan Ackman, http://www.forbes.com/2002/07/01/0701topnews.html*

Apparently in large part as a result of a protective order stipulated to by the parties in this case, the Court's docket has become in effect a "secret docket" that does not provide to the public any kind of information at all as to many of the proceedings so far in this case. The docket sheet – undeniably a judicial document – simply lists mysterious motions and objections as being lodged under seal, with no indication to the public as to what these motions are about. [2]

Respectfully, Media Intervenors ask this Court to be mindful of another, yet no less significant, responsibility and test of the Court: Just as Sarbanes-Oxley mandates truthfulness and transparency in corporate governance, the First Amendment of the United States Constitution and the common law rights of the public require openness, visibility, and clarity in all phases of a criminal trial. The Supreme Court of the United States has noted that secrecy in criminal trials "breeds suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980). The Court's responsibility to pay heed to the First Amendment is magnified by the fact that this case is of historic and precedent-setting scope.

Far beyond Mr. Scrushy's guilt or innocence in this trial, what is equally at stake is whether the American public will continue to place their confidence in the branch of government charged with protecting its financial future. If federal law rightfully punishes those who would secretly cheat the investing public, and exonerates those who have been wrongfully accused of doing so, then the administration of that law must not take place shrouded in secrecy.

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[2] The docket is the sole focus of this motion for leave to intervene. The press and public are unable to intelligently determine whether the secrecy of any specific filings so far filed under seal may be challenged, because the docket is bereft of any description of what those motions are.

ARGUMENT

I. The Sealing of the Court's Docket in this Case Impacts the Press and Public's First Amendment Rights.

A. The Public has a First Amendment Right of Access to Criminal Trial Proceedings.

The public's First Amendment right of access to criminal trial proceedings is firmly established. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001); *see also Press Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) ("Press Enterprise II"); *Press Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press Enterprise I"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

Respecting the press' role as the eyes and ears of the public, courts have long recognized that public scrutiny over the court system serves to: (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding. *Barber v. Conradi*, 51 F. Supp. 2d 1257, 1266 (N.D. Ala. 1999) (quoting *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). "It is generally accepted that the First Amendment guarantees the press and the public access to aspects of court proceedings, *including documents*, 'if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct.' " *Id.* (emphasis added) (quoting *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (citing *Press Enterprise II*, 478 U.S. at 8)).

For a court to exclude the press or public from a criminal proceeding and still comport with the First Amendment, "it must be shown that the denial is necessitated by a

compelling governmental interest, and is narrowly tailored to serve that interest." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d at 1310 (quoting *Richmond Newspapers*, 448 U.S. at 607 (plurality opinion)). The Eleventh Circuit has held that a court must consider less intrusive alternatives to closure. *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983) (citing *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976)). If closure is warranted, however, the restriction on access must be narrowly drawn with only that part of the proceeding as is necessary closed. *Id.* "A presumption of access must be indulged to the fullest extent not incompatible with the reasons for closure." *Id.*

Justice Brennan, in his concurring opinion in *Richmond Newspapers*, discussed the importance, purpose, and function of the First Amendment and its particular relevance and role in connection with open criminal proceedings. As summarized by the Third Circuit Court of Appeals,

> Justice Brennan, in concurrence, argued that the First Amendment "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." The right of access, Justice Brennan continued, has particular weight when claimed in the context of "an enduring and vital tradition of public entree to particular proceedings or information," and the importance of access to "a particular process" must be measured "in terms of that very process." To Justice Brennan, "Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."

United States v. Smith, 776 F.2d 1104 (3d Cir. 1985) (quoting *Richmond Newspapers*, 448 U.S. at 587-95 (Brennan, J., concurring)) (citations omitted).

As shown below, the obscurity of the docket in this case does not satisfy the constitutional requirement that secrecy be sparingly applied, and Media Intervenors

respectfully submit that the docket's obscurity is neither predicated upon a "compelling interest" nor "narrowly drawn."

B. Public Access to the Court's Docket is Intimately Bound with the First Amendment Right of Access to Criminal Proceedings.

Because docket sheets are indexes to judicial proceedings and documents, they provide the public with the capacity to exercise their rights guaranteed by the First Amendment. *Hartford Courant Co. v. American Lawyer Media, Inc.*, 371 F.3d 49, 59-60 (2d Cir. 2004).

Docket sheets provide more, however, than just an outline of important stages in and the outcomes of judicial proceedings. In another case involving a secret docket, the influential Second Circuit Court of Appeals recently expounded on the integral role of courts' docket sheets:

> In the case of docket sheets, "openness . . . enhances both . . . basic fairness . . . and the appearance of fairness so essential to public confidence in the system." Precisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness. They have also been used to reveal potential judicial biases or conflicts of interest. In addition, docket sheets furnish an "opportunity both for understanding the system in general and its workings in a particular case." By inspecting materials like docket sheets, the public can discern the prevalence of certain types of cases, the nature of the parties to particular kinds of actions, information about the settlement rates in different areas of law, and the types of materials that are likely to be sealed. Thus, docket sheets do not constitute the kinds of government records that function properly only if kept secret, like grand jury proceedings.

Hartford Courant, 371 F.3d at 62.[3]

[3] Tellingly, the Second Circuit Court of Appeals noted that the Eleventh Circuit would concur in its analysis, citing *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), *cert. denied sub nom. Times Publ'g Co. v. District Court*, 510 U.S. 907 (1993). *Hartford Courant*, 371 F.3d at 62.

C. The First Amendment Requires this Court's Docket to Contain Meaningful, Substantive Information.

Courts nationwide have recognized that, for all practical purposes, the docket is the gateway to the public's First Amendment right of access. "The ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Hartford Courant*, 371 F.3d at 59. The sufficiency of information provided by the Court's docket implicates the public's First Amendment right of access because "every order sealing documents has, by definition, a court-closure component." *United States v. Gonzalez*, 927 F. Supp. 768, 774 (D.D.C. 1996). The Eighth Circuit Court of Appeals has also recognized the importance of public access to a substantively meaningful docket:

> [t]he docketing of motions to close a proceeding or seal certain documents provides notice to the public, as well as to the press, that such a motion has been made and, assuming that such motions are docketed sufficiently in advance of a hearing on or the disposition of the motion, affords the public and the press an opportunity to present objections to the motion.

In re Search Warrant, 855 F.2d 569, 575 (8th Cir. 1988).

Rejecting a secret docket in *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), *cert. denied sub nom. Times Publ'g Co. v. District Court*, 510 U.S. 907 (1993), the Eleventh Circuit Court of Appeals also recognized that the "maintenance of a public and a sealed docket [was] inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings" and that the effect is to "effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences." *Valenti*, 987 F. 2d at 715 (citing *CBS, Inc. v. District Court*, 765 F.2d 823, 826 (9th Cir. 1985)).

In its analysis, the *Valenti* court applied a historical-access approach to determine the propriety of locking courts' records away from the public:

> [I]n determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific "findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."

Id. at 713 (citing *Press Enterprise I*, 464 U.S. at 510). The court noted that, as a result of the dual docketing system, no public record was maintained of closed, pretrial bench conferences or the filing of pretrial *in camera* motions. *Id.* at 715. The court held that "the Middle District's maintenance of a dual-docketing system [was] an *unconstitutional* infringement on the public and press's qualified right of access to criminal proceedings." *Id.* (emphasis added). Thus, the dual-docketing system at issue in *Valenti* violated the public's *First Amendment* right of access by rendering it impossible for anyone to exercise that right.

Other District Courts in this circuit have highlighted the public notice function that a meaningful docket provides. In *United States v. Robinson*, 2000 WL 3317463 (M.D. Fla. 2000), the United States District Court for the Middle District of Florida reviewed the adequacy of its docketing procedures in a criminal matter in light of the test set forth in *Valenti*. *Robinson*, 2000 WL 3317463, at *1. The court held that the clerk's unilateral entry of the words "Sealed Document" on the docket sheet did "not give the public an opportunity to be present when the motion [to seal was] made. And more importantly, this practice [did] not allow the public and press to make an *informed decision* about whether to object to the sealing." *Id.* (emphasis added). This is exactly the problem here. The press and public can only guess as to what the large volume of

sealed motions, oppositions, and orders mean in this case. The *Robinson* court found, as should this Court, that the better practice is for the movant requesting secrecy to file a motion to seal in the open record so that the motion itself is publicly docketed. *Id.* Such practice "gives the public and press an opportunity to challenge the motion, if they so desire." *Id.* Only in this fashion can the public be assured that secrecy serves a compelling interest and is narrowly tailored to serve that interest. In the matter at hand, the public cannot make an informed decision about whether to object to the sealing of a document unless the docket discloses information regarding the substance, type, and/or kind of information that is sealed. At a minimum, filings should not be sealed unless a motion to seal, with some indication as to the substance, type, and/or kind of information that is sought to be sealed, is first filed and publicly docketed.

Only in this manner does the public have an opportunity to see if it has an interest in challenging the motion and can make an informed decision about whether to do so.[4] As demonstrated in *Valenti* and *Robinson*, a court's docketing procedures have considerable impact on the public's First Amendment right of access to criminal proceedings. To deny the public a meaningful docket is to deny the public the opportunity to exercise its First Amendment rights.

D. The Sheer Volume of Sealed Documents and the Manner in Which They Have Been Sealed Precludes Exercise of the Public's First Amendment Right of Access.

On April 13, 2004, this Court entered a Protective Order by Consent, which ordered that "Counsel for the parties avoid commenting in court papers that are not filed

[4] If the Court is of the initial impression that requiring the filing of motions to seal prior to the sealing of documents would be lengthy or unduly disruptive in this matter, that fact in and of itself might suggest that the sealing process is being overused.

under seal on evidence that is irrelevant to legal matters at issue therein." (Protective Order of 4/13/04, Docket No. 158, at C.) Whether intended or not, that protective order has now engendered a secret docket, and did so without the public having an opportunity to examine what – if any – compelling interests justified secrecy.

Since the entry of the protective order, 29 out of 54 documents – more than 50% of the filings – have been filed under seal in this case. Based on the limited information contained in the Court's docket, it is impossible to tell whether any motions to seal have been filed since that time. The entries on the Court's docket commonly indicate only the following information: "MOTION |for order by [party]|filed cs [FILED UNDER SEAL]." *See, e.g.*, Docket Nos. 170, 171, 175, 182, 183, 190, 193, 200, 207, 211. Even if some of the above-referenced docket entries pertain to motions to seal, no notice was provided to the public, as the motions themselves were filed under seal and the docket entry provides no descriptive information regarding the substance of the motion. Without knowing anything about the nature of the motions or other documents being filed under seal, the public has no basis for challenging their sealing. Thus, in a case of historic import, the public is denied the ability to see whether its law is being applied, what arguments this defendant is making, and how the government is responding. The manner and extent to which documents have been filed under seal and docketed here have rendered the public's First Amendment right of access to this criminal proceeding "merely theoretical." *See Hartford Courant*, 371 F.3d at 59.

II. Even Under a Common Law Analysis, the Public Would Still be Entitled to Access Greater than that Afforded by the Court's Current Docket.

A. The Common Law Right of Access to Judicial Documents is Clearly Established.

The United States Supreme Court recognized the common law right of access to inspect and copy judicial records and documents in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The Fifth Circuit Court of Appeals applied *Nixon* in *Belo Broadcasting Corp. v. Clark*, 654 F. 2d 423 (5th Cir. 1981), noting that the common law right of access "predates the Constitution itself."[5] *Belo Broad. Corp.*, 654 F.2d at 426, 429.

B. The Court Must Balance the Presumption of Access Against Competing Interests.

To be sure, the common law right of access is not absolute. *Nixon*, 435 U.S. at 597. "As with any other form of access, it may interfere with the administration of justice and hence may have to be curtailed." *Newman v. Graddick*, 696 F. 2d 796, 803 (11th Cir. 1983). In that regard, the Eleventh Circuit has made it clear that a district court must balance the presumptive right of access against important competing interests. *U.S. v. Rosenthal*, 763 F. 2d 1291, 1294 (11th Cir. 1985). The Eleventh Circuit Court of Appeals has articulated the competing interests which must be examined prior to sealing:

> The Supreme Court has indicated a number of relevant factors in the balancing test. . . . [The] district courts [should] look to whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, whether access is likely to promote public understanding of historically significant events, and whether the press has already been permitted substantial access to the contents of the records.

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Belo Broadcasting* was decided on August 28, 1981.

Newman, 696 F.2d at 796 (citing *Nixon*, 435 U.S. at 598-603 & n.11).

Similarly, in *United States v. Rosenthal*, 763 F.2d 1291 (11th Cir. 1985), the Court of Appeals applied the *Nixon* common law standard to determine whether a right existed to copy wiretap information that had been legally acquired pursuant to federal statutes and introduced as evidence in a criminal proceeding. *Id.* at 1292-93 ("We must begin our discussion by recognizing the presumptive common law right to inspect and copy judicial records.") (quoting *Nixon*, 435 U.S. at 597). Although the district court had denied the media entity's request for access to the wiretap materials based on the right to privacy, the appellate court vacated the district court's order, remanded the case for a determination of whether the media entity should be granted access, and instructed the district court that, although it was entitled to take into account other factors in making its determination, it may not withhold the wiretap materials simply because they were potentially invasive of privacy. *Id.* at 1292, 1295.

Although the proper balancing of these factors is committed to the sound discretion of the trial court, *In re Four Search Warrants*, 945 F. Supp. 1563, 1568 (N.D. Ga. 1996) (citing *Nixon*, 435 U.S. at 599), there has been no opportunity at all here for the press or public to present its interests to this Court prior to sealing. Moreover, the public has not had an opportunity to see what important interests justify litigating a historic criminal case in secrecy. Those rare counterbalances to the public's right of access cannot be assumed. They must be openly articulated and examined by the Court in which the public places its trust.[6]

[6] Intervenors recognize that there is a limited palette of justifications for secrecy, and wish to assure the Court and litigants that the focus of this motion is not to obtain proprietary trade secrets, material that would endanger an ongoing investigation, or similar rare but valid established important interests that may

C. The Public Interest and Presumption of Openness Weigh in Favor of Public Access to the Docket.

The Court's docketing procedures have effectively denied the public access to this important case. As set forth above, Media Intervenors here seek access to meaningful docket information in this case for the following reasons: (1) the majority of filings since this Court's entry of the Protective Order by Consent on April 13, 2004, have been filed under seal; (2) since that time, no notice has been provided to the public by way of the filing and docketing of motions to seal prior to the sealing of documents; and (3) the absence of any descriptive information provided on the Court's docket renders the public unable to make an informed decision about whether to challenge the sealing of any given document.

Just as in *Newman*, a substantive, meaningful docket is important in this case if the public is to appreciate fully the significant events at issue. Guided by the Supreme Court's admonition in *Press Enterprise I*, this Court has the opportunity to ensure that public access will not only promote public understanding of this historically significant litigation, but also enhance both "basic fairness" and the "appearance of fairness so essential to public confidence in the system." *See Press Enterprise I*, 464 U.S. 501, 508. The heightened public attention associated with this case only increases the need for the appearance of fairness. As the Supreme Court has recognized, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

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offset the presumption of access. Even if those are the justifications for secrecy – and the public can only guess – such secrecy must still be narrowly tailored.

CONCLUSION

For all of the above reasons, Media Intervenors seek leave to intervene in this matter for the limited purpose of seeking an order: (1) requiring that all previous docket entries pertaining to sealed filings be amended to disclose information regarding the title of the pleading filed, the substance, type, and/or kind of information that is sealed and in the case of Orders, a summary line describing the Court's disposition of the motion to which it relates; and (2) mandating that no additional filing be made under seal unless it has first been preceded by a motion, publicly docketed, and with sufficient notice to the public, describing the substance, type, and/or kind of information sought to be sealed.

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of September, 2004, served the above and foregoing Motion by Bloomberg News, The Associated Press, The Hearst Corporation, The Reporters Committee for Freedom of the Press, and The Birmingham News Company by placing a copy of the same in the United States mail, properly addressed and postage prepaid, on the following:

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